

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

WILD FISH CONSERVANCY, et al.,

Plaintiffs,

v.

NATIONAL PARK SERVICE, et al.,

Defendants.

CASE NO. C12-5109 BHS

ORDER GRANTING  
DEFENDANTS' MOTION TO  
DISMISS

This matter comes before the Court on Defendants Robert Elofson, Mike McHenry, Doug Morrill, and Larry Ward's ("Tribal Defendants") motion to dismiss (Dkt. 114). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion for the reasons stated herein.

**I. PROCEDURAL HISTORY**

On November 11, 2012, Plaintiffs Wild Fish Conservancy, Wild Steelhead Coalition, Federation of Fly Fishers Steelhead Committee, and Wild Salmon Rivers d/b/a the Conservation Angler ("Plaintiffs") filed a first supplemental complaint for declaratory

1 and injunctive relief against Defendants National Park Service; Jonathan B. Jarvis, in his  
2 official capacity as the Director of the National Park Service; United States Department  
3 of the Interior; Kenneth L. Salazar, in his official capacity as the Secretary of the United  
4 States Department of the Interior; United States Fish and Wildlife Service; Daniel M.  
5 Ashe, in his official capacity as the Director of the United States Fish and Wildlife  
6 Service; United States Department of Commerce; John E. Bryson, in his official capacity  
7 as the Secretary of the United States Department of Commerce; NOAA Fisheries Service  
8 (“NMFS”); Samuel D. Rauch III, in his official capacity as the Acting Assistant  
9 Administrator for Fisheries of NOAA Fisheries Service (collectively “Federal  
10 Defendants”); and the Tribal Defendants. Dkt. 66

11 With regard to the Tribal Defendants, Plaintiffs assert one cause of action against  
12 the Tribal Defendants for unauthorized take of protected species in violation of Section 9  
13 of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–1544. Dkt. 1, ¶¶ 183–187.

14 On December 20, 2012, the Tribal Defendants filed a motion to dismiss for lack of  
15 subject matter jurisdiction. Dkt. 114. On January 7, 2013, the Federal Defendants  
16 responded (Dkt. 116) and Plaintiffs responded (Dkt. 117). On January 11, 2013, the  
17 Tribal Defendants replied. Dkt. 119. On January 14, 2013, Plaintiffs filed a surreply.<sup>1</sup>  
18 Dkt. 122. On February 5, 2013, the Tribal Defendants filed a notice of supplemental  
19 authority. Dkt. 123.

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21 <sup>1</sup> Plaintiffs move to strike the Federal Defendants’ response because it supports the  
22 motion to dismiss and Plaintiffs will not have an opportunity to respond. Although the Federal  
Defendants’ response does not contain material substantially different from the motion, the Court  
will not consider the response in determining the motion.

1 On February 7, 2013 the Court granted Plaintiffs' motion for leave to file an  
2 amended complaint. Dkt. 124.

## 3 II. FACTUAL BACKGROUND

4 The Tribe operates multiple hatchery programs pursuant to a Hatchery and  
5 Genetic Management Plan ("HGMP") developed through a collaborative process  
6 involving the Tribe, the independent, congressionally chartered Hatchery Scientific  
7 Review Group ("HSRG"), and various federal and state agencies, including NMFS,  
8 FWS, the National Park Service ("NPS"), the United States Geological Survey  
9 ("USGS"), and the Washington Department of Fish and Wildlife ("WDFW"). *See* Dkt.  
10 99 at 3–4. The Tribal Defendants contend that "the HGMPs were carefully crafted and  
11 exhaustively reviewed to achieve these goals and to minimize potential risks to  
12 threatened salmonids." Dkt. 114 at 3.

13 Originally, Plaintiffs alleged that the Tribal Defendants were operating these  
14 hatchery programs without the proper permits and/or approvals from the government.  
15 *See* Dkt. 1. Late last year, everything changed because the government issued new  
16 approvals. Specifically, on December 10, 2012, NMFS formally approved the Tribe's  
17 four HGMPs and the state of Washington's HGMP for its Chinook salmon hatchery  
18 program, pursuant to 50 C.F.R. § 223.203(b) ("the 4(d) Rule"). *See* Doc. 111-1 (4(d)  
19 Rule Limit 6 Evaluation and Recommended Determination); Doc. 111-2 (Decision  
20 Memorandum). The Deputy Regional Administrator's Decision Memorandum provides  
21 as follows:  
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1       The five Elwha River salmon and steelhead supportive breeding  
2       programs are not new, and all incorporate best management practices and  
3       hatchery reforms considered necessary to provide for program operation  
4       while minimizing potential risks to ESA-listed species. Given that removal  
5       of the Elwha dams has made natural habitat inhospitable for natural origin  
6       fish in the lower Elwha River where salmon and steelhead production has  
7       been confined for 100 years, and the term of recovery of river and estuary  
8       habitat needed to sustain natural production is highly uncertain, the  
9       proposed hatchery programs are widely supported in the regions' salmon  
10      management and scientific communities to reduce the risk that salmon and  
11      steelhead populations remaining in the Elwha River from becoming  
12      extirpated.

13      *Id.* at 3. In addition, NMFS prepared a Biological Opinion ("BiOp") and issued an  
14      Incidental Take Statement ("ITS"). *See* Dkt. 11–3.

15      The agencies' approvals accordingly exempt the hatchery programs from the  
16      "take" prohibition with respect to potential effects on threatened Puget Sound steelhead,  
17      Puget Sound Chinook salmon, and bull trout. In approving the Tribe's HGMPs and joint  
18      resource management plan ("RMP") with the State, NMFS expressly provided that its  
19      approval exempts the programs from the "take" prohibition:

20               NMFS has reviewed the five plans provided by the [Lower Elwha  
21               Klallam Tribe ("LEKT")] and WDFW pursuant to limit 6 of the 4(d) Rule,  
22               and evaluated them together against the requirements of the 4(d) Rule.  
23               Based on this evaluation, NMFS' determination is that activities  
24               implemented as described in the five plans would not appreciably reduce  
25               the likelihood of survival and recovery of ESA-listed Puget Sound Chinook  
26               salmon or steelhead, and that the plans address all of the criteria specified  
27               in Limit 5 of the 4(d) Rule. If the Regional Administrator concurs with this  
28               recommended determination, take prohibitions would not apply to activities  
29               implemented in accordance with the five co-manager HGMPs composing  
30               the hatchery RMP for salmon and steelhead populations in the Elwha River  
31               watershed.

1 Doc. 111-1 at 66; *see also* Doc. 111-2 at 7 (Regional Administrator, concurring). The  
2 ITS's issued by NMFS and FWS also recognize the exemption from potential "take"  
3 liability that they provide. *See* Doc. 111-3 at 185; Doc. 100-1 at 43; Doc. 100-3 at 41.

4 The parties dispute the legality of the hatcheries' current operations. In the  
5 amended complaint, Plaintiffs allege that the Tribal Defendants are not operating their  
6 hatcheries in accordance with the government's approval that was issued on December  
7 10, 2012. Dkt. 115-1, ¶¶ 23, 26. Plaintiffs, however, have failed to allege that they  
8 provided the Tribe written notice of specific violations. Mr. Morrill declares that the  
9 Tribal Defendants are operating the hatchery program in conformity and compliance with  
10 the government issued approvals. Dkt. 120, Declaration of Doug Morrill, ¶ 2.

### 11 **III. DISCUSSION**

12 As a threshold matter, this appears to be an issue that could have been resolved via  
13 stipulation because every position Plaintiffs present in opposition has been squarely  
14 rejected. To summarize, the case law makes sense: once the government issues an  
15 approval to take endangered species, the fight lies with the government and not the entity  
16 that received such approval. There is, however, an exception to this general rule when  
17 the entity is operating outside the scope of the permit. But, if such a circumstance exists,  
18 the complaining party must give notice to the entity and an opportunity to cure the  
19 alleged illegal operations before filing suit. Although Plaintiffs allege that the Tribal  
20 Defendants are operating outside of their permits, Plaintiffs have failed to give the Tribal  
21 Defendants notice of specific acts that can be cured. Therefore, the Tribal Defendants  
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1 shall be dismissed and the matter can proceed with Plaintiffs' challenges to the  
 2 government decisions and actions.<sup>2</sup>

3 Article III of the United States Constitution limits the federal courts' jurisdiction  
 4 to actual cases or controversies, *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d  
 5 1118, 1123 (9th Cir. 1997), and "prohibits federal courts from taking further action on the  
 6 merits in moot cases," *Env'tl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071,  
 7 1076 (9th Cir. 2001). Whenever a case loses its character as a present, live controversy,  
 8 it is moot. *Am. Rivers*, 126 F.3d at 1123. "[A]n actual controversy must be extant at all  
 9 stages of review, not merely at the time the complaint is filed." *Ctr. for Biological*  
 10 *Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 804 (9th Cir. 2008) (citations omitted).

11 The Tribal Defendants argue that Plaintiffs' claim against them has become moot.  
 12 "The party asserting mootness bears a 'heavy' burden; a case is not moot if any effective  
 13 relief may be granted." *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006,  
 14 1017 (9th Cir. 2012) (citation omitted). Declaring an issue moot "is justified only when  
 15 it is 'absolutely clear' that the litigant no longer has 'any need of the judicial protection  
 16 that it sought.'" *Id.* (citing *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224  
 17 (2000) (per curiam)).

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21 <sup>2</sup> This summary serves two puposes: (1) to summarize the following discussion and (2) to  
 22 highlight the reccurring theme that both the Court's and the parties' resources are being  
 unnecessarily consumed with matters that could be resolved more efficiently.

1 Although the Tribal Defendants have acquired approval for their activities from  
2 the government, Plaintiffs argue that their claim is not moot. First, Plaintiffs claim that  
3 there will be future violations:

4 Chambers Creek steelhead released by the Elwha Defendants will  
5 continue to return to the Elwha River for the next two to three years. Dkt.  
6 70, ¶¶ 50, 52. These highly-domesticated fish will continue to harm ESA-  
7 listed steelhead. Id. at ¶¶ 52-53. The Court therefore retains jurisdiction to  
8 enter injunctive relief to counteract the continuing effects of these unlawful  
9 releases. See Gordon, 849 F.2d at 1245. Such relief may include ordering  
10 Elwha Defendants to maintain hatchery gates open during Chambers Creek  
11 steelhead returns and to staff the hatchery holding ponds in an effort to  
12 intercept as many of these fish as possible. See Dkt. 70, ¶ 52.

13 Dkt. 117 at 12. The Tribal Defendants counter that it

14 has already committed to “keep open the hatchery outfall gates during the  
15 period of Chambers Creek returns and . . . harvest all Chambers Creek fish  
16 that return to the hatchery.” Doc. 103 ¶38. Under the native steelhead  
17 HGMP, weirs and traps will be operated at the hatchery “to collect and cull  
18 the last remaining returns of marked, early-returning Chambers Creek  
19 lineage adult steelhead.” Doc. 114 at 22:5-7. NMFS’s ITS is also clear that  
20 “[t]he Action Agencies must ensure that [the Tribe] continue[s] to remove .  
21 . . any Chambers Creek steelhead encountered at weirs and traps or at the  
22 hatchery.” Doc. 111-3 at 193 ¶3d. Because the relief proposed by Plaintiffs  
is already required, it would not be meaningful for this Court to enter such  
an order. And although Plaintiffs also argue that the Court “has jurisdiction  
to prevent future unlawful releases” of Chambers Creek fish, Doc. 117 at  
13:2-3, the Tribe has permanently terminated the program, and there is  
nothing for the Court to enjoin.

Dkt. 119 at 7. The Court finds that the Tribal Defendants have met their burden to show  
that future illegal “take” will not occur.

Second, Plaintiffs allege that the Tribal Defendants are not operating in  
conformance with the newly issued approvals. The ESA, however, requires Plaintiffs to  
provide “notice of the violation.” 16 U.S.C. § 1540(g)(2)(A)(1). “The key language in

1 the notice regulation is the phrase ‘sufficient information to permit the recipient to  
2 identify’ the alleged violations and bring itself into compliance.’” *Waterkeepers*  
3 *Northern California v. AG Industrial Mfg., Inc.*, 375 F.3d 913 (9th Cir. 2004) (quoting  
4 *Cnty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*, 305 F.3d 943, 951 (9th  
5 Cir. 2002)). It is undisputed that Plaintiffs have failed to provide any notice of any  
6 alleged violation. Even in their brief, Plaintiffs only allege that “available information  
7 indicates that the Defendants do not have adequate funding to conduct even one year of  
8 the most basic monitoring and adaptive management activities required for their hatchery  
9 programs.” Dkt. 117 at 24.<sup>3</sup> On the other hand, the Tribal Defendants have submitted  
10 evidence that the hatchery programs are operated in compliance with the government’s  
11 approvals. Therefore, the Court finds Plaintiffs’ argument meritless.

12 Finally, Plaintiffs request that the Court hold an evidentiary hearing or allow them  
13 leave to conduct discovery. Neither of these actions is appropriate. With regard to an  
14 evidentiary hearing, Plaintiffs must offer more specific allegations than the general  
15 “Defendants’ hatchery activities causing take are ongoing.” Dkt. 117 at 24. In order to  
16 enter a finding of fact, Plaintiffs would have to provide evidence or sufficient information  
17 to identify an alleged violation. They have failed to do this. With regard to discovery,  
18 Plaintiffs have failed to show a need for Court-ordered discovery because Plaintiffs have  
19 failed to give the Tribal Defendants notice in the form of sufficient information of a  
20 specific illegal act that can be corrected. Once this occurs and Tribal Defendants fail to

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22 <sup>3</sup> Even if lack of “adequate funding” was a violation of the ESA, it’s unclear whether the  
Court has the power to order the Tribal Defendants to obtain “adequate funding.”



1 correct any such act, then a new action may be filed. Therefore, the Court denies  
2 Plaintiffs' requests.

3 **IV. ORDER**

4 Therefore, it is hereby **ORDERED** that the Tribal Defendants' motion to dismiss  
5 (Dkt. 114) is **GRANTED** for lack of subject matter jurisdiction. The Clerk shall  
6 terminate these Defendants.

7 Dated this 12<sup>th</sup> day of February, 2013.

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10 BENJAMIN H. SETTLE  
11 United States District Judge  
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